

Supreme Court, U. S.

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No. 76-1297

In the Supreme Court of the United States

OCTOBER TERM, 1976

MORRIS H. MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner contends that a pretrial order by the district court declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

An indictment returned on June 15, 1976, in the United States District Court for the Western District of Tennessee charged petitioner and others with conspiring to defraud the government (Count I), with bribery in connection with a loan made by a federally insured bank, in violation of 18 U.S.C. 215 and 2 (Count II), and with misapplication of the funds of a federally insured bank, in violation of 18 U.S.C. 656 and 2 (Count III). Petitioner moved before trial to dismiss Count III, contending that a trial on both Counts II and III would violate the Double Jeopardy Clause of the Fifth Amendment. The district court denied the motion (Pet. App. 3b).

Petitioner immediately appealed. The court of appeals dismissed the appeal, following *Hoffa v. Gray*, 323 F. 2d 178 (C.A. 6), which had held that double jeopardy contentions, like other claims of constitutional error, must await review in the ordinary course if the defendant is convicted. The court of appeals recognized (Pet. App. 4b-5b) that other courts have entertained pretrial appeals to resolve double jeopardy questions, but it concluded that even if it were disposed to follow those other decisions petitioner would not be entitled to appellate review before trial. Those cases, the court of appeals explained, allowed immediate review only when a defendant already had stood trial and was contending that his *second* trial would violate the Double Jeopardy Clause; petitioner, however, has yet to stand trial.

The question presented by petitioner is similar to the question before the Court in *Abney v. United States*, No. 75-6521, argued January 17, 1977. We submit, however, that there is no need to hold this case pending the Court's disposition of *Abney*. However the Court may decide *Abney*, petitioner will derive no benefit.¹ The court of appeals correctly pointed out that the foundation for the argument that double jeopardy claims may be appealed before trial is that the Double Jeopardy Clause protects against multiple trials and that this protection might be diluted if double jeopardy claims could not be reviewed on appeal until after the second trial had ended. Here, however, petitioner has yet to be tried a first time. Nothing in petitioner's arguments, even if they were correct, would block his pending trial. His double jeopardy claim pertains only to Count

¹Under such circumstances, this Court has denied petitions for certiorari even though *Abney* claims are raised. See *Young v. United States*, No. 76-704, certiorari denied, December 13, 1976; *Fielhauer v. United States*, No. 76-6227, certiorari denied, March 21, 1977.

III of a multi-count indictment. He will be tried no matter what disposition is made of his contentions. Accordingly, the petition for a writ of certiorari should be denied forthwith, so that the trial of petitioner (and of his co-defendants) can proceed.

We submit, moreover, that this case is an illustration of our argument in *Abney* that many contentions can be disguised in double jeopardy language, and that a rule allowing pretrial appeals of double jeopardy claims could provide lengthy delay (as it has in this case) to defendants who believe that delay is advantageous. Petitioner's contention is nothing more than that Counts II and III are multiplicitous. That claim is based entirely upon statutory construction, and it does not implicate any interests protected by the Double Jeopardy Clause. "[A]n accused must suffer jeopardy before he can suffer double jeopardy" (*Serfass v. United States*, 420 U.S. 377, 393), and petitioner has never been put in jeopardy on either Count II or Count III. Whether or not petitioner may be *convicted* on both Count II and Count III, there is no constitutional reason why he may not be *tried* on both counts.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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²What is more, the counts are not multiplicitous. A person may bribe an officer of the bank without misapplying bank funds, and he may misapply bank funds without using the money as a bribe. Cf. *Iannelli v. United States*, 420 U.S. 770, 785 n. 17; *Blockburger v. United States*, 284 U.S. 299.